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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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IN RE:

TYCO INTERNATIONAL, LTD.

Multidistrict Securities
Litigation

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* No. 02-md-1335-PB

* August 17, 2009

* 12:00 p.m.

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SPECIAL HEARING
BEFORE THE HONORABLE PAUL J. BARBADORO

Appearances:

For ERISA Actions: Robert A. Izard, Jr., Esq.
Shatz & Nobel, P.C.

Kenneth G. Bouchard, Esq.
Bouchard, Kleinman & Wright, P.A.

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McGuire Woods, LLP

Edward A. Haffer, Esq.
Sheehan, Phinney, Bass & Green

For Kozlowski: Jyotin Hamid, Esq.
Debevoise & Plimpton, LLP

Richard B. McNamara, Esq.
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Court Reporter: Sandra L. Bailey, CSR, CM, CRR
Official Court Reporter
U.S. District Court
55 Pleasant Street
Concord, NH 03301
603-225-1454

1 BEFORE THE COURT

2 THE CLERK: Court is now in session and has
3 for consideration today a motion hearing in case number
4 02-md-1335, Tyco Litigation in the ERISA matter.

5 THE COURT: Good morning. I've read the
6 pleadings and feel I have a reasonably good
7 understanding of the proposed settlement, but I do have
8 a few questions, and after you answer these questions,
9 if there's anything you feel you need to add, please let
10 me know.

11 Mr. Izard, one of the things I wanted to get
12 at least a preliminary understanding of is how this
13 proposed settlement fits under the damage models that
14 were prepared by your expert. I know you referenced
15 that in a memorandum to some extent but, and
16 particularly how the the ADT/AMP merger affected, and
17 claims you have based on those matters, affect the
18 potential settlement. So, can you give me a little bit
19 more information as to, say, what a full recovery would
20 have been using your damage models and segregate out
21 what the recovery would have been had you not succeeded
22 in persuading me that shares involved in the ADT and AMP
23 mergers were involved.

24 MR. IZARD: There are a lot of variables in
25 the model, your Honor, so I apologize if this gets a

1 little complicated, but the bottom line is that the
2 court concluded that there was no duty to sell the ADT
3 and AMP shares, and there's another category of shares
4 from a company called Mallinckrodt which is in the same
5 boat. If that were the case, damages would have been
6 zero to very little, and frankly --

7 THE COURT: Well less than the 70 million
8 that's proposed.

9 MR. IZARD: If it got to seven figures we
10 would have been happy, so no, the conversations we had
11 on that topic were quite significant in terms of the
12 analysis, and with our client, that was a big factor.

13 THE COURT: Did I have, I can't recall, did I
14 have any of those discussions with you on a record that
15 was transcribed, do you remember?

16 MR. IZARD: I believe that there were some --
17 the first conversation was after the summary judgment
18 hearing in October. Then we had two conversations on
19 the record, telephone conversations, one I believe was
20 in December because I was -- I can't remember the date
21 because I was calling from home because there was a
22 blizzard, and we had another one, and I know the court
23 at one point made reference to guidance I've given in
24 the past. Whether the guidance was actually laid out on
25 the transcript, I'm not a hundred percent.

1 THE COURT: Do you remember, Maryanne, whether
2 that telephone call was recorded?

3 THE CLERK: I think the one with the blizzard
4 was.

5 THE COURT: I think there was. We will have
6 to check and see. I just want, so that anyone reviewing
7 this record understands, there was a summary judgment
8 motion litigated in this case. During the course of the
9 oral argument on that motion an additional issue was
10 raised I think by Tyco's counsel concerning how loss
11 causation and how damages generally, depending upon how,
12 as to certain claims, how you would view the ADT and AMP
13 and Mallinckrodt shares in damage models, and I provided
14 some initial guidance during a post motion hearing
15 discussion with counsel, both counsel being present, and
16 it was something at the time that was not on the record.
17 I then asked for additional briefing, my recollection
18 is, as to what the parties' positions were. I undertook
19 a very detailed analysis of the parties' respective
20 positions on that, did some substantial legal research,
21 thought about the issue for a great deal, and formed
22 some preliminary views about how that issue would be
23 resolved if it were to be raised with me, and I had at
24 least one telephone conference where I heard the parties
25 again on the issue and discussed the matter with them

1 and expressed my preliminary reviews concerning that
2 matter. My recollection, and this is somewhat
3 superficial but, is that I expressed views that
4 suggested that the plaintiffs had some substantial
5 difficulty with respect to including shares from those
6 mergers in the recovery of the proposed class, and I
7 want to be clear, I undertook a very detailed assessment
8 of that issue because the parties had informed me that
9 it was very important to their ongoing settlement
10 discussions.

11 So, is that consistent with how you remember
12 our discussions on that point?

13 MR. IZARD: Yes. I think what I took from it
14 was you expressed great skepticism but said you'd listen
15 to our experts, but I was not filled with confidence,
16 I'll leave it at that.

17 THE COURT: And I think the parties that asked
18 me for that kind of preliminary assessment, I was not
19 involved in ongoing settlement negotiations in this
20 case, but I think the parties were of the view that some
21 kind of preliminary view from the judge on that issue
22 might help the parties better evaluate their respective
23 positions for settlement, so at the request of the
24 parties I did provide that assessment and it was one
25 that I'm sure was concerning for the plaintiffs

1 especially in view of what you're telling me now. Your
2 damage models would suggest that the recovery to the
3 class would be far less than \$70 million but for the --
4 but for the inclusion of the ADT and AMP and
5 Mallinckrodt cases.

6 Now, what I'm not understanding fully from the
7 settlement documents is how does this money get
8 disbursed to class members. What is the allocation
9 models that you're using to allocate money received in
10 settlement?

11 MR. IZARD: Basically the plan of allocation
12 we have is the plan of allocation that's been used in
13 every other ERISA company comp case in which I have any
14 familiarity. The bar that does this is pretty small and
15 basically we're using the model everybody uses, and
16 additionally there will be an independent fiduciary
17 here, I'm 99 percent sure, who is very familiar with
18 these models as well. Basically you take the amount of
19 money in each participant's individual account on the
20 day of the class period. You add to that any additions
21 to that account. This is in the Tyco stock. You add
22 additions to that during the class period. You subtract
23 from that withdrawals from the Tyco stock during the
24 class period and then you subtract the amount left at
25 the end of the class period, so that's sort of a loss

1 number, if you will, and then the factors created based
2 on each individual participant's loss factor, if you
3 will, and then that factor is applied to the settlement
4 memo. And here there is a de minimus amount which are
5 -- if in fact you're running the computer program you
6 would recover less than \$10, then you don't recover
7 anything at all and that money goes back into the pool
8 and it's recalculated.

9 THE COURT: What did the -- how does the plan
10 of allocation address its shares that are attributable
11 to ADT, AMP and Mallinckrodt?

12 MR. IZARD: They are treated as -- they are
13 counted fully.

14 THE COURT: Fully.

15 MR. IZARD: Yes.

16 THE COURT: And you think that's justifiable
17 despite my concern of about your possibility of a
18 successful recovery as to those matters because in fact
19 the risk associated with a different result is the risk
20 that is primarily driving Tyco's decision to pay what
21 it's willing to pay.

22 MR. IZARD: I think so. I also think that,
23 you know, everybody can make an argument that, gee, my
24 situation is a little bit different, and frankly in
25 these ERISA cases, the vast majority of the damages tend

1 to be what we call holder shares. There really aren't
2 that many new purchases during the class period, not
3 just in this case, but generally speaking because the
4 class periods are relatively shorter than people who
5 have been employed --

6 THE COURT: Well, to the extent the class
7 period overlapped with the Tyco Securities class period,
8 new purchasers would have already received partial
9 compensation as a result of participants in that
10 settlement.

11 MR. IZARD: That is correct and they have.

12 THE COURT: All right. So, if we look at the
13 issue of potential intraclass conflict, your view is you
14 can continue to adequately represent the whole class,
15 the plan of allocation provides uniform benefits to
16 members of the whole class, you think that that can be
17 done in a principal way because it is the shares of
18 Mallinckrodt, ADT and AMP that are principally driving
19 the settlement amount. Without those, other
20 shareholders might not have recovered anything
21 substantial at all, and given the risk of an adverse
22 result, it's appropriate to include them.

23 One of the things I'm going to have to look at
24 and you should give careful consideration to is whether
25 there are any potential intraclass conflicts and whether

1 there's a need for me to address it. I don't at this
2 point see that they are problematic, but it is something
3 that I will be looking at when I get to the final
4 approval stage.

5 Having addressed those basic issues, the
6 amount of the settlement certainly strikes me as
7 reasonable given the representations that you've made at
8 least sufficiently to allow it to proceed to final
9 approval. I don't have any reason to question the plan
10 of allocation that you're talking about at the present
11 time.

12 The other area that I wanted to address with
13 you briefly, or the two areas, are notice and your fees
14 and expenses.

15 It is not completely clear to me with respect
16 to fees whether you have taken a fixed position yet as
17 to what you're going to be seeking on a percentage basis
18 for fees. I read your agreement as saying up to
19 33 percent, but that you do not otherwise specify what
20 your final proposal will be with respect to fees. Is
21 that right?

22 MR. IZARD: That's correct. I can tell you,
23 judge, though, that it will essentially be lodestar.

24 THE COURT: All right, I do think you should
25 pay careful attention to the order I issue with respect

1 to fees in the plaintiff's securities action in this
2 case where I undertook a very, I think, very detailed
3 analysis of what was a gigantic fee request. On a
4 percentage of fund basis, it is less than 33 percent,
5 but I think, and I recognize this is a much smaller
6 settlement and so the arguments are different with
7 respect to super mega fund cases and cases in this
8 magnitude which are much smaller, but I want you to
9 understand you better be prepared to defend any fee
10 request that you make using the form of analysis that I
11 have suggested should be undertaken. And my initial
12 reaction is that I do not see myself approving a
13 33 percent fee request very lightly in a case like this,
14 and I will be carefully scrutinizing your fee request.

15 Having said that, I think we have to bear in
16 mind that this result seems to me to be a very strong
17 positive result for the class, first. Second, I know
18 from having endured the agony of working on this case
19 for so many years that even though you were a much
20 smaller player in the plaintiff's class, you were
21 involved from the beginning in a way that few people
22 were and required to undertake very substantial work on
23 behalf of the class and defer payment, any compensation
24 for many, many years, things that I don't take lightly.

25 So I don't want to be overly negative here. I

1 just think that I would be skeptical at a request for a
2 third of the recovery, and I expect you to defend any
3 fee request that you make using the analysis that I
4 provided in the ruling I made in the claim securities
5 action, okay.

6 So let's just talk briefly about notice and
7 tell me what -- Maryanne, can you come here for a
8 second -- tell me what you're, where you are planning to
9 do notice, how you're planning to deal with former class
10 members who are -- class members who are no longer
11 active participants in the Tyco stock fund, what efforts
12 you're going to make to try to locate -- the people who
13 are active participants it's easy to get notice, but
14 people who are out of the system but are class members,
15 I want to be sure we're taking all reasonable means to
16 give them adequate notice. You can go ahead.

17 MR. IZARD: Your Honor, I need to also bring
18 up one wrinkle with respect to Mallinckrodt, so I want
19 to break it down to two groups. One is 90 percent of
20 the people who are in the Tyco plans as well as ADT and
21 AMP, Fidelity was the trustee and record keeper
22 throughout the class period and is still the record
23 keeper and the trustee. They have the name, address and
24 social security number of every class member. They have
25 this past week updated all the addresses they have for

1 every class member that is currently in the system, and
2 they put in the last known address for all those who
3 have left the system. What we propose to do to that
4 group is to mail notice, and to the extent there is
5 returns, by virtue of having the former addresses and
6 social security numbers, it's quite easy to locate their
7 current addresses, so we are confident that we can
8 provide actual notice by mail to virtually every class
9 member.

10 Mallinckrodt, there's a tiny window which
11 creates an issue. American Express was the trustee and
12 record keeper for the Mallinckrodt plan up until
13 December of 2002. They no longer have their records.
14 But also when the Mallinckrodt company was merged into
15 Tyco effective January 1, 2002, they set up a Tyco
16 client account as well. So if you were an employee of
17 Mallinckrodt as of January 1 of 2002, you're already in
18 the Tyco system that would be covered in this Fidelity
19 database we have.

20 For those employees at Mallinckrodt who left
21 the employment of Mallinckrodt between October 17, 2000
22 and January 1 of 2001, those people, and I don't know
23 how many there are, but those people would not be
24 included in the Fidelity database that we have.

25 A second sort of way to capture additional

1 people is regardless of whether they left the employ of
2 Mallinckrodt between October and January of --
3 October '00 and January of 2001, if they remained in the
4 Mallinckrodt plan, you know, often they stay as members
5 of the plan even though they're not employed, for
6 example, if they retire, the Mallinckrodt plan was
7 merged into the Tyco plan in December of 2002, so that
8 if you remained in the Mallinckrodt plan, you would have
9 been picked up by Fidelity in 2002. So we're only
10 talking, I think, a very small number of people. And
11 the way we would propose to capture that group would be
12 to publish notice in the St. Louis I believe Post
13 Dispatch. Mallinckrodt was a St. Louis company and I've
14 been told that that's the main paper in St. Louis, and
15 obviously the web site and everything else. So I think
16 by virtue of those means, practically that's pretty much
17 all we can think of to do, but we should capture almost
18 everybody by notice through that means.

19 There's a second wrinkle, getting back to the
20 Mallinckrodt issue on the plan of allocation that we
21 need to talk about, and we'd like to submit some
22 supplemental papers describing this because, well,
23 Fidelity has all the records of every purchase and every
24 sale of the Tyco stock from every account, and there's
25 computer programs that can run this plan of allocation,

1 and to the extent that Mallinckrodt employees started
2 buying Tyco stock in the Tyco stock fund through the
3 Tyco plans on January 1st, 2001 when the new account was
4 set up, we got all that data too, but we don't have any
5 transaction data for the old Mallinckrodt plan until we
6 get to December 2002, so there's a hole there, and we
7 had it at the plan line level because the plans have
8 audited financial statements, so we know how much the
9 Mallinckrodt plan as a whole bought and sold, just as we
10 know as the Tyco plan bought and sold, but we don't know
11 how it's unitized among each of the individual
12 participates. Hopefully they have the records. So what
13 we propose to do, if acceptable to the court is, we can,
14 using the formula, we can say how much is the
15 Mallinckrodt plan share, how much is the Tyco plan
16 share. We can run a formula, and if the final approval
17 occurs, then the effect is it's distributed to the Tyco
18 people almost immediately. With the Mallinckrodt people
19 we're going to have to do a proof of claim type process
20 where they need to submit their account statements.

21 THE COURT: What percentage of the total award
22 would be subject to this proof of claim process?

23 MR. IZARD: My assumption, and again, we just
24 found this out on Friday, but my assumption is that it's
25 in the ten percent realm.

1 THE COURT: Okay, and what we would -- the
2 existing documents, are they going to need to be amended
3 to talk about proof of claim process? You're going to
4 have to submit amended documents using the kind of proof
5 of claim the way we did in the securities class action,
6 right?

7 MR. IZARD: Only with respect to the
8 Mallinckrodt.

9 THE COURT: Only with respect to Mallinckrodt.

10 MR. IZARD: Right.

11 THE COURT: All right, well, you should -- can
12 you have any amendments done within -- when are we
13 talking about the final hearing?

14 MR. IZARD: Well, I jotted down some dates
15 here if I may share those with the court.

16 THE COURT: Yeah.

17 MR. IZARD: I think our hope was that we could
18 have a final approval hearing sort of the second week of
19 November, third week of November, some time before
20 Thanksgiving. Then we can basically send out in the
21 notice, say by September 21st, that will give everybody
22 time to submit a revision and for the court to look at
23 it. We could publish in the St. Louis for a couple
24 weeks in a row starting in September as well. We can
25 have the objection date by, say, Monday, November 2nd,

1 which would give essentially six weeks for people to
2 review and consider whether to object. And then the
3 hearing would be, say, you know, again, later on
4 mid-November before Thanksgiving and then the hope would
5 be we could get it all wrapped up and distributed either
6 this year or earlier the next year.

7 THE COURT: Yeah, I mean, I like to distribute
8 to the extent we can this year --

9 MR. IZARD: Yes.

10 THE COURT: -- but we can do the final
11 approval hearing in November. Those dates sound fine.
12 You will give them to the clerk. Will you be able to
13 get amended documents filed, say, within the next two
14 weeks so that we can get out at least to the people who
15 are affected, the Mallinckrodt section of the class
16 should see how the proof of claim process works so if
17 they have an objection in the proof of claim process,
18 they can raise it.

19 MR. IZARD: Absolutely, your Honor.

20 THE COURT: Okay. All right, that makes
21 sense. I have one more thing on my list and that was
22 the amount of the Swartz/Kozlowski settlements here
23 which on the surface seem low, but at least in my
24 understanding, you can respond to this. Kozlowski, I
25 think the claims against Kozlowski are far more

1 difficult in this action than they are against Swartz
2 because of his not being involved directly on the plan
3 committee that was responsible for overseeing the plans
4 at issue here, not that the claims were impossible, but
5 they're much less likely. The Swartz settlement you
6 suggest may be driven by ability to pay concerns to some
7 extent?

8 MR. IZARD: Yes.

9 THE COURT: Now, I thought Tyco has an
10 indemnification obligation as to Swartz in his capacity
11 as the chair of the committee and would ultimately be
12 there to satisfy judgments against him in any event.

13 MR. IZARD: Well, that's sort of an issue
14 that's somewhat in dispute. It hasn't really come up
15 before the court as much, but the plans say that the
16 indemnification does not apply in the event of willful
17 misconduct, and so we were kind of skirting a fine line
18 here because we had to show a breach of fiduciary duty
19 on one hand, but no willful misconduct on the other hand
20 and, you know, part of our case is that Swartz was
21 really a problem. So that would have been a vigorously
22 contested issue, your Honor, and I think that the Tyco
23 settlement reflected Swartz's --

24 THE COURT: That's the point I was going to
25 make. It seems to me, and maybe Ms. Edwards and your

1 representative can confirm this, but to the extent Tyco
2 ultimately settled here, it was encompassing any risk it
3 foresaw of it being held responsible for indemnification
4 for any judgment against Swartz, and of course you're
5 not agreeing that you have any indemnification
6 obligation and you dispute that, but that to the extent
7 you agreed to a settlement, it's part of a package in
8 which you try to assess risk associated with the
9 potential that even if you were to escape liability,
10 that liability could be against Swartz and against your
11 own contention, you might be held to have some
12 indemnification obligation. Am I seeing that correctly?

13 MS. EDWARDS: That is absolutely correct, your
14 Honor.

15 THE COURT: All right. So I think that helps
16 to explain that issue. Now, finally on the ability to
17 pay, in the course of settlement negotiations did you
18 receive sufficient cooperation from Mr. Swartz so that
19 you were able to assure yourself as a representative of
20 the class that you're not being conned, that he doesn't
21 have a hundred million hidden away somewhere else that
22 would have been available to satisfy potential judgment?

23 MR. IZARD: Well, I discussed in detail Mr.
24 Swartz's economic circumstances with his counsel, Mr.
25 Grudberg, and a condition of the settlement agreement is

1 that we received a sworn declaration demonstrating that
2 the asset line structured is confirmed by or as
3 represented by counsel.

4 THE COURT: I think that's important because
5 you may get class members who will look at this, those
6 that actually read the agreements carefully, you may
7 have people saying why are they letting what they see as
8 the principal bad guys out so lightly, and I think you
9 have legitimate explanations, but you need to be sure
10 you've done your due diligence and the fact that you can
11 support that and represent to the court that you have
12 satisfied yourself that indeed there are a lack of
13 sufficient assets to justify a higher individual
14 settlement against Mr. Swartz who I, personally in this
15 case, in this case, the claims are probably strongest
16 against him, stronger perhaps even than Tyco who cast
17 some arguments about why it shouldn't have to pay, even
18 if I bought your arguments on damages. So I think the
19 strongest possible claims are probably against Swartz,
20 but there are good reasons why the structure is such
21 that Tyco pays the bulk of it and Swartz pays a
22 relatively small amount.

23 MR. IZARD: And one other wrinkle as well is
24 that there are significant tax claims against Mr.
25 Swartz, and were we to get a judgment --

1 THE COURT: You'd be behind.

2 MR. IZARD: Yes. We may be behind general
3 creditors as the Touch America case we cited in the
4 papers. So this was a hundred percent driven by our
5 perception of collectability and, you know, Swartz is in
6 a situation where, you know, we're not the only case
7 against him, so it's sort of an overall balancing risk
8 reward and frankly this -- and we negotiated long and
9 hard with Mr. Swartz and this is where we ended up and
10 we think it's fair in the grand scheme of things.

11 THE COURT: All right, anything else you want
12 to say? I'm going to give Ms. Edwards and the other
13 individual defendants opportunity to speak. I do want
14 to underscore the -- I take -- pay attention on this
15 attorney's fee request and amply justify it, and I do
16 think, I'm not requiring you to do this, but I do think
17 it was somewhat helpful that Tyco brought -- excuse me,
18 the plaintiffs' class brought in independent --
19 commissioned an independent assessment of the proposed
20 fee request to determine its reasonableness. It wasn't
21 the only thing that I relied on, but it was significant
22 here. I want to be sure that, and I have nothing but
23 respect for you in the way of the work that you've done,
24 I'm not in any way calling into question, I just think I
25 want to be sure that the deal that is struck on fees is

1 in the best interest of the class as well as fairly and
2 appropriately compensating you for the work that you've
3 done, so --

4 MR. IZARD: I understand that, your Honor.

5 THE COURT: I take that very seriously.

6 MR. IZARD: Yes, and just from our
7 perspective, your Honor, you know, we're happy with
8 whatever the court deems is fair. It's been a long
9 road. This is basically our lodestar. So if the court
10 thinks that that's too high, then we're --

11 THE COURT: I'm not saying in any way that it
12 is. I'm just saying pay attention to it, look it over
13 carefully, because I'll be looking at it carefully. But
14 I say that with nothing -- I have nothing but respect
15 for you and the hard work you've done here and the
16 quality of the result, you deserve to be compensated
17 fairly and you will be compensated fairly.

18 MR. IZARD: Thank you.

19 THE COURT: All right, Ms. Edwards, did you
20 want to say anything on behalf of Tyco?

21 MS. EDWARDS: No, your Honor. We're pleased
22 that we have been able to March these cases to
23 resolution.

24 THE COURT: You fought very hard in these
25 cases and defended your client, you and your colleagues.

1 I've been very hard on Tyco from time to time and I know
2 you must have been frustrated with me, but I appreciate
3 your and the company's willingness, and I recognize
4 settlement these days are particularly hard with
5 financial difficulties the companies face and the fact
6 that we actually have three companies that have to
7 participate in settlement here, so in some ways it's
8 quite impressive that you were able to get to the point
9 of bringing everybody together that needed to be brought
10 together to settle, so I appreciate your good work in
11 this matter.

12 MS. EDWARDS: Thank you, your Honor.

13 THE COURT: Did any of the defendants, other
14 defendants want to say anything at all at this time?
15 No? All right, thank you, I think that concludes the
16 hearing then. We will use the schedule that you
17 suggested. And the sooner you can get the revised
18 papers in on the Mallinckrodt issue the better, and get
19 them up on the web site so that people can see them and
20 study them, and then I'll look forward to receiving your
21 papers and holding a final approval hearing at some
22 point in November.

23 MR. IZARD: And should we contact the clerk
24 about a firm date?

25 THE COURT: Yes, yes, she will have -- she has

1 my authority to agree to whatever dates that work for
2 you folks. If you can satisfy her, it satisfies me. So
3 after the hearing, work out the details of the dates
4 with her so that she can have a record of them.

5 MR. IZARD: Thank you, your Honor.

6 THE COURT: Thank you.

7 (Adjourned at 12:30 p.m.)

8

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10 C E R T I F I C A T E

11

12 I, Sandra L. Bailey, do hereby certify that
13 the foregoing transcript is a true and accurate
14 transcription of the within proceedings, to the best of
15 my knowledge, skill, ability and belief.

16

17

18 Submitted: 10/9/09 /s/ Sandra L. Bailey
19 SANDRA L. BAILEY, LCR, CM, CRR

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